# AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1889.**

No. 1276.

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

C. D. VINCENT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

**FILED OCTOBER 1, 1889.**

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 5, 1889

1-101 In the Circuit Court of the United States (9th Circuit) in and for the District of Nevada.

C. D. VINCENT, Plaintiff,
*vs.*
LINCOLN COUNTY, Defendant.

The plaintiff complains of the defendant, and for cause of action against it avers, 1:

A.

That the plaintiff is a non-resident of the State of Nevada and is a citizen and resident of the State of California.

B.

That the defendant ever since the 26th day of February, 1866, has been and yet is a body politic and corporate, to wit, a duly organized and existing county of and within the State of Nevada, organized under and by virtue of a statute of said State of Nevada entitled "An act to create the county of Lincoln and provide for its organization," which act was approved February 26th, 1866, and said defendant is a citizen of the said State of Nevada.

C.

That at its sixth session and in the year 1873 the Legislature of said State of Nevada passed an act entitled "An act to consolidate and fund the indebtedness of Lincoln county," which act was approved February 17th, 1873.

That the defendant thereafter, on the 1st day of March, 1873, under and pursuant to said last-named statute, made, executed, and delivered to J. N. Williams its bond, signed by the chairman of its board of county commissioners, countersigned by its county auditor, and endorsed by its county treasurer, which bond is in the words and figures following:

No. 43. STATE OF NEVADA, *Lincoln County.* $100.

*Lincoln County Bond.*

In accordance with an act of the Legislature of the State of Nevada entitled "An act to consolidate and fund the indebtedness of Lincoln county, approved February 17th, A. D. 1873," the county of Lincoln, in the State of Nevada, promises to pay to J. N. Williams or the holder hereof, at the office of the treasurer of said county, on or before the first day of January, A. D. one thousand eight hundred and eighty-three, in the manner provided in said act, the sum of one hundred dollars in United States gold coin, together with interest thereon from the date hereof at the rate of ten per cent. per annum, payable in like gold coin annually, at the county

treasurer's office aforesaid, on the first day of January of each year, upon the surrender of the annexed respective coupons.

In witness whereof and in accordance with the act aforesaid this bond is signed by the chairman of the board of county commissioners and countersigned by the county auditor and endorsed by the county treasurer, with the seal of the county hereto affixed, and the chairman of said board and county treasurer have signed the annexed coupons as of the first day of March, A. D. one thousand eight hundred and seventy-three.

[Seal of County.]

D. A. FULKS,
*Chairman Board County Commissioners.*

Countersigned by—
W. H. HENDERSON,
*County Auditor.*

The said bond is endorsed, "John Roeder, county treasurer," and across its face is printed in red ink $100. To this bond was annexed ten coupons for interest falling due each year upon said bond. Each coupon was for the sum of $10, and each was signed by the chairman of the board of county commissioners and by the county treasurer, and in all respects complied with the provisions of said funding act. The coupon for interest due January 1st, 1874, on said bond was numbered in red ink on the face of the coupon 1. The coupon for interest due January 1st, 1875, on said bond was numbered in red ink on the face of the coupon 2. The coupon for interest due January 1st, 1876, on said bond was numbered in red ink on the face of the coupon 3. The coupon for interest due January 1st, 1877, on said bond was numbered in red ink on the face of the coupon 4. The coupon for interest due January 1st, 1878, on said bond was numbered in red ink on the face of the coupon 5. The coupon for interest due January 1st, 1879, on said bond was numbered in red ink on the face of the coupon 6. The coupon for interest due January 1st, 1880, on said bond was numbered in red on the face of the coupon 7. The coupon for interest due January 1st, 1881, on said bond was numbered in red ink on the face of the coupon 8. The coupon for interest due January 1st, 1882, on said bond was numbered in red ink on the face of the coupon 9. The coupon for interest due January 1st, 1883, on said bond was numbered in red ink on the face of the coupon 10; that said bond and all said coupons numbered 6, 7, 8, 9, & 10 remain unpaid.

D.

That after the issuing of said bond and coupons and before the filing of this complaint the said bond and said unpaid coupons were by the owner and holder thereof transferred and delivered to plaintiff, who is now the owner and holder thereof.

E.

That at its eighth session and in the year 1877 the Legislature of

the State of Nevada passed an act entitled "An act to amend an act entitled 'An act to consolidate and fund the indebtedness of Lincoln county, approved February 17, 1873,'" which act was approved on January 18th, 1877.

That at no time has there been any money in the interest fund of defendant to pay said bond or any of said unpaid coupons, and under and in pursuance of said last-named act each of said unpaid coupons was, within one year after it fell due, presented to the county treasurer of said Lincoln county for payment and payment demanded, but each and all of said coupons remain unpaid because the money in said interest fund was and is exhausted, and the said treasurer on such presentation of coupons failed and refused to pay the same or any of them, but indorsed on each of such coupons his certificate of registration, as in said last-named act provided.

F.

That there is now due, owing, and unpaid to plaintiff on said bond number 43 and said unpaid coupons for interest due on such bond the sum of $150 in gold coin, together with interest on such bond and coupons from the date of maturity of each at the rate of ten per cent. per annum.

* * * * * * *

102 Wherefore plaintiff prays judgment against the defendant for the sum of sixty-eight thousand six hundred and twenty dollars in gold coin, together with interest on the sum of $370 of said amount from January 1st, 1878, at the rate of 10 per cent. per annum, and on the sum of $4,550 of said amount from January 1st, 1879, at the rate of 10 per cent. per annum, and on the sum of $4,550 of said amount from January 1st, 1880, at the rate of 10 per cent. per annum, and on the sum of $4,550 of said amount from January 1st, 1881, at the rate of 10 per cent. per annum, and on the sum of $4,550 of said amount from January 1st, 1882, at the rate of 10 per cent. per annum, and on the sum of $50,050 of said amount from January 1st, 1883, at the rate of 10 per cent. per annum, and costs of suit.

FREEMAN, BATES & RANKIN,
*Attorneys for Pl'ff.*

103 STATE OF CALIFORNIA, }
*City and County of San Francisco,* } *ss:*

C. D. Vincent, being duly sworn, on oath says: I am the plaintiff in the foregoing action. I have heard read the complaint and know its contents, and the same is true of my own knowledge.

C. D. VINCENT.

Subscribed and sworn to before me this 19th day of August, 1886.

[SEAL.]

LEE D. CRAIG,
*Notary Public.*

104–109 [Endorsed:] In the circuit court of the U. S. (9th circuit), district of Nevada. C. D. Vincent, plaintiff, *vs.* Lincoln County, defendant. Complaint. Action at law to recover on bonds and coupons of Lincoln county. Filed Aug. 20, 1886. T. J. Edwards, clerk. Freeman, Bates & Rankin, att'ys for plaintiff.

110 *Answer.*

In the Circuit Court of the United States, Ninth Circuit and District of Nevada.

C. D. VINCENT, Plaintiff,
*vs.*
LINCOLN COUNTY, Defendant.

Now comes the above-named defendant, by its attorneys, and for answer to plaintiff's complaint herein denies and alleges as follows:

Denies each and every allegation in said complaint marked "D" as the same appears on each and every page of said complaint.

Denies that plaintiff is the owner and holder of the bonds and coupons mentioned in said complaint or any part thereof.

Denies that there is any sum of money whatever due upon said bonds or coupons mentioned in said complaint as or for interest thereon after the maturity of said bonds or coupons.

Defendant further shows to the court that plaintiff's complaint does not state facts sufficient to constitute a cause of action or to entitle him to any judgment for interest upon any of said bonds or coupons after their maturity, but avers and shows to the court that it appears upon the face of said complaint that neither
111 said bonds or interest coupons thereto attached bear any rate of interest whatever from or after their maturity.

Defendant further avers and shows to the court that no action can be maintained or judgment had upon any of the interest coupons numbered five (5), six (6), seven (7), eight (8), and nine (9) and annexed to said bonds, as set out in said complaint; but that the same are barred by reason of the provisions of an act entitled "An act defining the time of commencing civil actions," approved November 21st, 1861, and an act entitled "An act amendatory of and supplementary to an act entitled An act defining the time of commencing civil actions," approved November twenty-first, one thousand eight hundred and sixty-one, and to repeal acts amendatory of said act approved March 5th, 1867, and by reason of the provisions of an act of the Legislature of the State of Nevada entitled "An act to amend an act amendatory of and supplementary to an act entitled An act defining the time of commencing civil actions, approved November twenty-first, one thousand eight hundred and sixty-one, and to repeal acts amendatory of said
112 act approved March fifth, one thousand eight hundred and sixty-seven," approved March 2d, 1877.

That none of the causes of action represented by said interest coupons annexed to said bonds and numbered five (5), six (6),

seven (7), eight (8), and nine (9), as set out in said complaint, accrued within four years of the time of the commencing of said action.

Wherefore defendant prays that plaintiff take judgment for no more than the principal of said bonds and the amount of the coupons thereto attached, numbered ten (10), and that no part of said judgment bear interest at any rate whatever.

T. J. OSBORNE AND
TRENMOR COFFIN,
*Attorneys for Defendant.*

STATE OF NEVADA, }
*County of Ormsby,* } *ss:*

Trenmor Coffin, being first duly sworn, doth depose and say that he is one of the attorneys for defendant in the above-entitled action; that he has read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and
113 belief, and that as to those matters he believes it to be true; that the reason this verification is made by affiant is that he resides in Ormsby county, Nevada, and that defendant neither resides in nor is present in said county.

TRENMOR COFFIN.

Subscribed and sworn to before me this 7th day of April, 1887.
T. J. EDWARDS, *Clerk.*

Endorsed: In U. S. circuit court, 9th circuit, district of Nevada. C. D. Vincent *vs.* Lincoln County. Answer. Filed Ap'l 7, 1887. T. J. Edwards, clerk. T. J. Osborne and Trenmor Coffin, att'ys for defendant.

*Amendments to Complaint.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Nevada.

C. D. VINCENT, Plaintiff, }
*vs.*
LINCOLN COUNTY, Defendant. }

The plaintiff, by leave of the court first had and obtained, hereby amends his complaint in the following respects:

1.

Add to subdivision C of each and every count and cause of action upon bonds issued to and in the name of J. N. Wil-
114 liams the following words: Each of said coupons was by its terms payable to the holder thereof. The said J. N. Williams was at the date of the said bond and ever thereafter continued to be and yet is a citizen and resident of the State of California and a non-resident of the State of Nevada.

* * * * * * *

115 STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

Geo. E. Bates, being duly sworn, on oath says: I am one of the attorneys for C. D. Vincent, the plaintiff in the foregoing action. The plaintiff is absent from the city and county, which is the place of my residence, and the facts stated in this affidavit are within my knowledge. The facts stated in these amendments to plaintiff's complaint are true of my own knowledge except as to matters therein stated on my information and belief, and as to these matters I believe them to be true.

GEORGE E. BATES.

Subscribed & sworn to before me this 29th day of December, 1887.

[SEAL.] GEO. T. KNOX,
*A Commissioner of the State of Nevada*
116 & 117 *in San Francisco, California.*

Endorsed: In the circuit court of the U. S., 9th circuit, in and for Nevada. C. D. Vincent *vs.* Lincoln County. Amendments to complaint. Filed Jan'y 6, 1888. T. J. Edwards, clerk. Freeman, Bates & Rankin, attorneys-at-law, 409 California street, San Francisco.

* * * * * * *

118 *Findings.*

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

C. D. VINCENT, Plaintiff, }
*vs.*
LINCOLN COUNTY, Defendant. }

This cause was tried before the court on the 4th day of June, 1888 (a jury having been waived), and was by the court taken under advisement. The court now, being fully advised in the premises, finds and decides—

1.

All the allegations contained in subdivisions A, B, C, and E of each and every cause of action set forth in plaintiff's complaint are true as alleged.

2.

All the bonds and coupons sued upon in this action are transferrable by delivery, and prior to the commencement of this action each and all of them were transferred and delivered by the then owners of them to the plaintiff in this action, and he has at all times thereafter continued to own and hold the same.

3.

The aggregate amount of the bonds of defendant owned
119 and held by plaintiff, as set forth in finding two hereof, is $45,500. All said bonds were issued by defendant and dated March 1st, 1873, and matured and became payable on January 1st, 1883, and are valid and subsisting obligations against defendant. Said bonds by their terms bore interest from their date at the rate of ten (10) per cent. per annum, payable annually in gold coin on the first day of January of each year. Coupons representing the amount of annual interest which would accrue on said bonds at and prior to the date of their maturity were attached to each bond and were numbered according to the year's interest which they were intended to represent, coupon numbered one being for the first year's interest, which was due on January 1st, 1874, and so on. The last coupon on said bond was numbered ten and was for the year's interest due on January 1st, 1883. None of plaintiff's bonds are or at the commencement of this action were barred by any statute of limitations or otherwise. All of said bonds bear interest from
120 their date of maturity, to wit, from January 1st, 1883, at the rate of ten per cent. per annum. The total amount due and owing from defendant to plaintiff for interest after maturity on said bonds is the sum of $26,630.13.

4.

At and prior to the date of the commencement of this action and at all times thereafter plaintiff was and yet is the owner and holder of certain coupons detached from bonds of defendant, which coupons are particularly described in his complaint herein. Said coupons aggregate in value the sum of $23,120, and they matured and became due and payable at the following times, to wit:

| | | | | | | |
|---|---|---|---|---|---|---|
| $370 | of | coupons | fell | due | January | 1st, 1878. |
| $4,550 | " | " | " | " | " | " 1879. |
| $4,550 | " | " | " | " | " | " 1880. |
| $4,550 | " | " | " | " | " | " 1881. |
| $4,550 | " | " | " | " | " | " 1882. |
| $4,550 | " | " | " | " | " | " 1883. |

All of said coupons as they fell due were presented to the treasurer of defendant and payment of them demanded and refused.
121 Payment was refused because there was no money in the treasury of defendant applicable to their payment. At its eighth session the Legislature of the State of Nevada passed an act entitled "An act to amend an act entitled 'An act to consolidate and fund the indebtedness of Lincoln county.'" This amendment was approved and became a law on January 18, 1877, and has never been amended or repealed. Acting as provided for in this act, the treasurer of defendant, as fast as matured coupons were presented to him for payment, which he could not pay for want of funds, indorsed on each coupon his certificate of registration, as in said act provided, and thereupon returned said coupon to the party

presenting it. After making registration the treasurer of defendant paid coupons in the order of their registration and maturity as money came into his possession applicable thereto.

At and prior to the date of the institution of this suit no money had ever come into the possession of the treasurer of defendant which was applicable to the payment of any of plaintiff's coupons.

122 Plaintiff's coupons due January 1, 1883, and all prior years are legal, valid, and subsisting claims against defendant, and are not barred by the provisions of any statute of limitations or otherwise. Said coupons do not bear interest, compound interest not being lawful in the State of Nevada.

I conclude the law to be that plaintiff is entitled to judgment against defendant for the sum of $95,250.13 in gold coin and costs of suit; that the principal of said judgment, to wit, $45,500, bears interest at 10 per cent. per annum from the date of its entry until paid. Let judgment be so entered.

Dated Nov. 8, 1888.

GEO. M. SABIN, *Judge.*

Endorsed: Circuit court United States, 9th circuit, district of Nevada. C. D. Vincent, pl'ff, *vs.* Lincoln County, def't. Findings. Filed Nov. 8, 1888. T. J. Edwards, clerk. Freeman, Bates & Rankin, att'ys for pl'ff.

123 *Judgment.*

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

C. D. VINCENT, Plaintiff,
*v.*
LINCOLN COUNTY, Defendant.

This cause having been tried before the court without a jury and submitted for decision, and the court having now filed its findings of fact and conclusions of law and ordered judgment entered in accordance thereof—

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that C. D. Vincent, the plaintiff, do have and recover of and from Lincoln County, the defendant, the sum of ninety-five thousand two hundred & fifty $\frac{13}{100}$ ($95,250.13) dollars in gold coin of the United States, together with plaintiff's costs and disbursements incurred in this action, hereby taxed at the sum of five hundred and one & $\frac{82}{100}$ dollars; that plaintiff also have and recover from defendant interest on $45,500 of said judgment at the rate of ten per cent. per annum from the date of entry hereof until paid.

Dated Nov'r 8, 1888.

124 Attest: T. J. EDWARDS, *Clerk.*

UNITED STATES OF AMERICA, } ss:
*District of Nevada,* }

I, T. J. Edwards, clerk of the circuit court of the United States for the district of Nevada, do hereby certify that the above and foregoing is a full, true, and correct copy of the original judgment now of record in my office, and that the annexed record is the judgment-roll in said action.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of the said court, at my office, in Carson City, this the 8th day of November, A. D. 1888, and in the year of our Independence the 113th.

T. J. EDWARDS, *Clerk.*

Endorsed: U. S. circuit court, dist. Nevada. C. D. Vincent *vs.* Lincoln County. Judgment-roll. Filed Nov'r 8, 1888. T. J. Edwards, clerk.

[On margin:] Judgment-roll.

125 *Opinion.*

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

CHARLES SUTRO *vs.* LINCOLN COUNTY.

NICHOLAS LUNING *vs.* LINCOLN COUNTY.

C. D. VINCENT *vs.* LINCOLN COUNTY.

The above-entitled cases are alike as to cause of action, and the same principles of law control the recovery in each case.

No contention has been made as to the legality of the bonds and coupons sued upon.

Had there been any contest on this point the case of Odd Fellows' Savings and Commercial Bank *vs.* Quillen, county treasurer of Lincoln county, reported in 11th Nevada Reports, page 109, must be considered as decisive of that question. In that case the validity of the bonds in suit was made a matter of contest and was directly considered and passed upon by the court and their validity established. See also Youngs *vs.* Hall, 9 Nev., 212.

126 Upon the submission of these cases to the court upon the pleadings and evidence three questions arise which must be decided in determining the amount of recovery to be had in each case.

These questions are correctly stated in plaintiff's brief as follows:

1st. Do the bonds in suit draw interest after their maturity, and at what rate?

2d. Do the coupons draw interest after their several dates of maturity, and at what rate?

3d. Are any of the coupons barred by limitation?

These questions will be answered in their order as above stated.

1st. The bonds in suit draw interest after maturity and "until said bonds are paid and liquidated" at the rate of ten per cent. per annum upon the principal sum of each of said bonds.

Stats. Nev., 1873, p. 54, sec. 2.
Gen'l Stats. Nev., p. 1088, sec. 4904.
McLane *vs.* Abrams, 2 Nev. Rep'ts, 199.

2d. The coupons sued upon do not draw interest after their maturity. Compound interest is not permissible under the laws of Nevada, not even where parties have so contracted.

Gen'l Stats. Nev., p. 1088, secs. 4903–'4.
127 Cox *vs.* Smith, 1 Nev. Rep., p. 161.

3d. None of the coupons sued upon in any of these cases are barred by the statute of limitations of Nevada.

Comp. Laws Nev., vol. 1, p. 247, sec. 1031.
Stats. Nev., 1877, p. 114.
Gen'l Stats. Nev., p. 878, secs. 3644, 3646.
Stats. Nev., 1873, p. 54, secs. 8, 9.
" " 1877, p. 46, sec. 1.
Underhill *vs.* Trustees of the City of Sonora, 17 Cal., p. 172.
Freehill *vs.* Chamberlain, treasurer of the city of Sacramento, 65 Cal., 603.

I should have little hesitancy in holding the coupons barred, as claimed by defendant's attorneys, did I not consider them, under the authorities above cited, withdrawn from the operation of the statute by the provisions of the Statute of Nevada of 1877, above cited.

The cases will be referred to a referee to ascertain and report to the court the amount due to plaintiff in each of the cases upon the principles above stated.

The report of the referee in each case will show—

1st. The amount due plaintiff upon the bonds in suit as
128 the principal thereof.

2d. The amount due upon said bonds as interest thereon after maturity at the rate of ten per centum per annum to the date of such report.

3d. The amount due upon the coupons sued upon in each case without interest.

Judgment will be entered in each case for the principal amount of the bonds sued upon, with interest thereon from maturity to the date of judgment, together with the amount due upon the coupons sued upon without interest on said coupons, and for costs.

The judgments will draw interest upon the principal sum due on said bonds, exclusive of interest thereon and the amount due upon coupons, at the rate of ten per cent. per annum until said judgments are paid.

Nov. 7th, 1888.

GEO. M. SABIN, *Judge.*

Endorsed: U. S. circuit court, 9th circuit, dist. Nevada. Chas. Sutro *vs.* Lincoln County; N. Luning *vs.* Lincoln Co.; C. D. Vincent *vs.* Lincoln County. Opinion of court. Filed Nov. 8, 1888. T. J. Edwards, clerk.

129 *Order Fixing Amount Bond on Writ of Error.*

Minutes of court fixing amount of bond in writ of error.

JULY 8TH, 1889.

C. D. VINCENT
*v.*
LINCOLN COUNTY.

On motion of Mr. Coffin, of counsel for defendant, it is ordered that a writ of error be allowed in this case upon the filing by defendant of a bond for costs in the sum of three hundred dollars.

*Bond on Writ of Error.*

Supreme Court of the United States.

LINCOLN COUNTY, Plaintiff in Error,
*vs.*
C. D. VINCENT, Defendant in Error.

Know all men by these presents that we, The County of Lincoln, as principal, and Joseph Ponjade and Henry Eilers, as sureties, are held and firmly bound unto C. D. Vincent in the sum of three hundred dollars, lawful money of the United States of America, to be paid to the said C. D. Vincent, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

130

Sealed with our seals and dated this 29th day of July, A. D. 1889.

Whereas the above-named County of Lincoln hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States, ninth circuit, district of Nevada: Now, therefore, the condition of this obligation is such that if the above-named County of Lincoln shall prosecute its said writ of error to effect and shall answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] H. W. TURNER,
*Chairman of the Board of County Commissioners of said County of Lincoln, with the Seal of said County Affixed.*
J. PONJADE. [SEAL.]
HENRY EILERS. [SEAL.]

UNITED STATES OF AMERICA,
*State of Nevada, County of Lincoln,* } *ss:*

131 Joseph Ponjade and Henry Eilers, the sureties on the foregoing bond, being duly sworn, on oath says, each for himself and not one for the other, that he is a citizen and resident of the said State and district of Nevada and is a freeholder therein, and that he is worth double the sum specified in said foregoing bond in property situate in said State and district over and above all his debts and liabilities and exclusive of property exempt from execution.

J. PONJADE.
HENRY EILERS.

Subscribed and sworn to before me this 29th day of July, A. D. 1889.

[NOTARIAL SEAL.] T. J. OSBORNE,
*Notary Public, Lincoln County, Nevada.*

Endorsed: Supreme Court of the United States. Lincoln County, pl'ff in error, *vs.* C. D. Vincent, def't in error. Bond on writ of error. Approved Sept. 2d, 1889. Geo. M. Sabin, judge. Filed Sept. 2, 1889. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

132 Supreme Court of the United States.

THE COUNTY OF LINCOLN, Plaintiff in Error,
*vs.*
C. D. VINCENT, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To C. D. Vincent, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the District of Nevada, wherein The County of Lincoln is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

GEO. M. SABIN, *Judge.*

133 [Endorsed:] Supreme Court of the United States. The County of Lincoln, pl't'f in error, *vs.* C. D. Vincent, def't in error. Citation. Filed Sept. 2d, 1889. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

DISTRICT OF NEVADA, *ss:*

T. J. Edwards, being first duly sworn, on oath says he is the clerk

of the circuit court of the United States for the district of Nevada; that on the 2d day of September, 1889, he served the within citation on Messrs. Freeman, Bates and Rankin, attorneys for said C. D. Vincent, by depositing in the United States post office at Carson City, Nevada, postage prepaid, a copy thereof addressed to said Messrs. Freeman, Bates & Rankin, at their office, in San Francisco, State of California, to wit, 409 California street.

T. J. EDWARDS.

Subscribed and sworn to before me this second day of September, 1889.

GEO. M. SABIN,
*U. S. Dist. Judge for Nevada.*

134 In the Supreme Court of the United States.

THE COUNTY OF LINCOLN, Plaintiff in Error,
*vs.*
C. D. VINCENT, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Nevada, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between C. D. Vincent and The County of Lincoln, a manifest error hath happened, to the great damage of the said County of Lincoln, as by *his* complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 14th day of October, A. D. 1889, being the second Monday thereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
135 of the said Supreme Court, the 2d day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal U. S. Circuit Court, Ninth Circuit, District of Nevada.]

T. J. EDWARDS,
*Clerk U. S. Circuit Court, 9th Cir. & Dist. Nevada.*

136 [Endorsed:] Supreme Court of the United States. The County of Lincoln, pl't'f in error, *vs.* C. D. Vincent, def't in

error. Writ of error. Copy hereof lodged in the clerk's office for the defendant in error this 2d day of September, 1889. T. J. Edwards, clerk. Filed Sept. 2d, 1889. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

137 *Assigned Errors.*

In the Supreme Court of the United States.

THE COUNTY OF LINCOLN, Plaintiff in Error,
*v.*
C. D. VINCENT, Defendant in Error.

The said plaintiff in error submits the following assignments of error in the making, rendering, and entering the judgment in said above-entitled action, to wit:

1.

The said circuit court erred in entertaining or exercising jurisdiction over the parties to or subject-matter of said action for the reasons—

First. That said plaintiff in error was and is an integral part of the State of Nevada and could not and cannot be sued except by the consent of said State and in conformity with its statutes, none of which permit or permitted said plaintiff in error to be sued in the said circuit court; and,

Second. The act under which said bonds and coupons sued upon in said action are alleged to have been issued specifically pro-
138 vides for all litigation concerning the same and names the court which shall have jurisdiction thereof, which is not said circuit court.

2.

The said circuit court erred in making, giving, rendering, or entering the judgment in said entitled action for the reason that the complaint therein does not state facts sufficient to constitute a cause of action, but affirmatively shows that no cause of action ever existed in favor of said plaintiff (defendant in error) against said defendant (plaintiff in error), in that—

First. It is not alleged in said complaint or shown thereby that the payment of said bonds and coupons or any of them was ever demanded at the place where they were made payable.

Second. It is not alleged in or shown by said complaint that said bonds and coupons or any of them were ever presented to the board of county commissioners and auditor of said county of Lincoln for allowance or rejection.

139 Third. It appears from said complaint that said bonds and coupons are payable, if payable at all, from a specific fund provided therefor, and therefore an action of debt against the county at large cannot be maintained thereon.

Fourth. It is not alleged in said complaint nor does it appear

thereby that said county of Lincoln was authorized by the Legislature of the State of Nevada to issue the bonds or coupons sued upon.

Fifth. It is not alleged in said complaint nor does it appear thereby that said county of Lincoln ever issued as its act and deed any of the bonds or coupons sued upon in said action.

Sixth. It is shown by said complaint that the act of the Legislature of the State of Nevada referred to therein and made a part thereof is void as being in contravention of the constitution of said State of Nevada, in that (1) the subject of said act is not expressed in the title thereof, and (2) the said act attempts to create and inject into the government of The County of Lincoln, the plaintiff in
140 error, a board of officers unknown to and unrecognized by said constitution, and which is not created or provided for any other county in the State, and imposing duties upon and granting powers to such board which are anomalous and extraordinary.

3.

The said circuit court erred in not sustaining the plea of the statute of limitations to the coupons set forth in said answer of said plaintiff in error.

4.

Said judgment is absolutely void as being against a defendant which never had an existence.

Wherefore said plaintiff in error prays that said judgment be reversed upon the writ of error herein sued out.

TRENMOR COFFIN,
T. J. OSBORNE, AND
GEO. S. SAWYER,
*Att'ys for Defendant in Circuit Court.*

[Endorsed:] Supreme Court of the United States. The County of Lincoln, pl'ff in error, *vs.* C. D. Vincent, def't in error. Assignment of errors and prayer for reversal. Filed Sept. 2d, 1889. T. J. Edwards, clerk U. S. cir. court, dist. Nevada.

141 In United States Circuit Court, Ninth Circuit and District of Nevada.

C. D. VINCENT, Plaintiff,
*v.*
LINCOLN COUNTY, Defendant.

I, T. J. Edwards, clerk of the circuit court of the United States for the ninth circuit and district of Nevada, do hereby certify that the foregoing one hundred and forty pages, printed and written, numbered from 1 to 140, both inclusive, are a true copy of the record and of all the proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this 6th day of September, A. D. 1889.

[Seal U. S. Circuit Court, Ninth Circuit, District of Nevada.]

T. J. EDWARDS, *Clerk.*

142 In the Supreme Court of the United States.

THE COUNTY OF LINCOLN, Plaintiff in Error,
*vs.*
C. D. VINCENT, Defendant in Error.

*Stipulation.*

It is hereby stipulated and agreed by and between the parties to the above-entitled action, acting through their duly authorized attorneys, that the printed record to be used in the Supreme Court of the United States upon the hearing of said cause shall consist of the following, to wit:

Page one (1) of the complaint, as amended January 6, 1888, said page being a count upon a bond issued in the name of J. N. Williams, the answer, findings, judgment, and this stipulation.

It is further stipulated and agreed that there are other
143 counts in said complaint upon other bonds and coupons, aggregating the amount for which judgment was rendered in accordance with the prayer of the complaint, and that the same principles are involved in each count.

It is further stipulated and agreed that the said cause may be submitted to the court upon printed arguments in accordance with rule 20.

H. F. BARTINE,
*Attorney for Plaintiff in Error.*
ABRAHAM CLARK FREEMAN,
*Attorney for Defendant in Error.*

144 [Endorsed:] Supreme Court U. S. 1889, October term. No. 1276. The County of Lincoln, pl'ff in error, *vs.* C. D. Vincent. Stipulation as to printing record & to submit under 20th rule.

[Stamped:] Office Supreme Court U. S. Filed Nov. 29, 1889. James H. McKenney, clerk.

Endorsed on cover: Nevada C. C. U. S. No. 1276. The County of Lincoln, plaintiff in error, *vs.* C. D. Vincent. Filed October 1, 1889.

Supreme Court, U. S.
FILED
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JAMES H. MCKENNEY
CLERK

IN THE

# Supreme Court of the United States.

*Nos. 1274, 1275, 1276.*

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

CHARLES SUTRO, DEFENDANT IN ERROR.

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

NICHOLAS LUNING, DEFENDANT IN ERROR.

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

C. D. VINCENT, DEFENDANT IN ERROR.

**BRIEF OF PLAINTIFF IN ERROR.**

H. F. BARTINE,
*Attorney for Plaintiff in Error.*

JUDD & DETWEILER, PRINTERS.

IN THE

# Supreme Court of the United States.

*Nos. 1274, 1275, 1276.*

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

CHARLES SUTRO, DEFENDANT IN ERROR.

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

NICHOLAS LUNING, DEFENDANT IN ERROR.

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

C. D. VINCENT, DEFENDANT IN ERROR.

## BRIEF OF PLAINTIFF IN ERROR.

### STATEMENT.

These are actions of debt brought by the defendants in error against "Lincoln County," by which term it is supposed they intended to designate the plaintiff in error, in the United States circuit court, ninth circuit, district of Ne-

vada, upon certain bonds and coupons thereto attached, which, it must be assumed from the evident theory of the action, it was attempted to allege were issued by said plaintiff in error, and at the time of the commencement of this action were owned and held by the defendants in error.

The complaints contain copies of the bonds and coupons sued upon.

The plaintiff in error interposed demurrers to the complaints, which, being overruled by said circuit court, were subsequently withdrawn and answers filed, which, while admitting none of the allegations of the complaints, specifically denied some of them and set up the plea of the statute of limitations to a number of the coupons specified therein.

The cases thus made were submitted to said circuit court, and on the — day of ——, A. D. 188–, judgments by said court were rendered in accordance with the prayer of the complaints in said actions in favor of said defendants in error and against "Lincoln County," which said judgments this plaintiff in error contends are void, and to review which the writs of error in these cases were sued out, and the plaintiff in error, as its grounds for suing out said writs, makes the following

## ASSIGNMENT OF ERRORS.

### I.

The said circuit court erred in entertaining or exercising jurisdiction over the parties to or subject-matter of said actions for the reasons—

First. That said plaintiff in error was and is an integral part of the State of Nevada and could not and cannot be sued except by the consent of said State and in conformity with its statutes, none of which permit or permitted said plaintiff in error to be sued in the said circuit court; and,

Second. The act under which said bonds and coupons sued upon in said action are alleged to have been issued specifically provides for all litigation concerning the same and names the court which shall have jurisdiction thereof, which is not said circuit court.

II.

The said circuit court erred in making, giving, rendering, or entering the judgments in said entitled actions for the reason that the complaints therein do not state facts sufficient to constitute a cause of action, but affirmatively show that no cause of action ever existed in favor of said plaintiffs (defendants in error) against said defendant (plaintiff in error), in that—

First. It is not alleged in said complaints or shown thereby that the payment of said bonds and coupons or any of them was ever demanded at the place where they were made payable.

Second. It is not alleged in or shown by said complaints that said bonds and coupons or any of them were ever presented to the board of county commissioners and auditor of said county of Lincoln for allowance or rejection.

Third. It appears from said complaints that said bonds and coupons were payable, if payable at all, from a specific fund provided therefor, and therefore an action of debt against the county at large cannot be maintained thereon.

Fourth. It is not alleged in said complaints nor does it appear thereby that said county of Lincoln was authorized by the Legislature of said State of Nevada to issue the bonds or coupons sued upon.

Fifth. It is not alleged in said complaints nor does it appear thereby that said county of Lincoln ever issued or

caused to be issued as its act and deed any of the bonds or coupons sued upon in said action.

Sixth. It is shown by said complaints that the act of the Legislature of the State of Nevada referred to therein and made a part thereof is void as being in contravention of the constitution of said State of Nevada, in that (1) the subject of the act is not expressed in the title thereof and (2) the said act attempts to create and inject into the government of The County of Lincoln, the plaintiff in error, a board of officers unknown to and unrecognized by said constitution and which is not created or provided for any other county in the State, and imposing duties upon and granting powers to such board which are anomalous and extraordinary.

III.

The said circuit court erred in not sustaining the plea of the statute of limitations to the coupons set forth in said answers of said plaintiff in error.

IV.

Said judgment is absolutely void as being against a defendant which never had an existence.

**ARGUMENT.**

I.

*The United States circuit court had no jurisdiction of the subject-matter of the actions or of the parties thereto.*

First. The plaintiffs (defendants in error) are alleged to be citizens of another State than the State of Nevada. The defendant (plaintiff in error) is an integral part, a political subdivision, of the State. The XI amendment to the Constitution of the United States provides as follows: "The

judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." A county is within this prohibition. See—

Sharp *vs.* Contra Costa County, 34 Cal., 291.
Clark *vs.* Lyon County, 8 Nevada, 185.
McBane *vs.* The People *ex rel.* Stout, 50 Ill., 544.
Barnes *vs.* District of Columbia, 91 U. S. S. C., 544.

Even the consent of the State or any of its departments could not give the United States courts jurisdiction, for it is a principle so well established that it would be supererogative to cite authorities upon the same that jurisdiction of courts cannot be conferred by the agreement or consent of litigants, but no consent appears in this case and no statute of the State of Nevada bears generally upon the question of the jurisdiction of suits or actions by and against counties except section 3667 of the General Statutes of the State, which is as follows: "Actions against a county may be commenced in the district court of the judicial district embracing said county, provided that actions between counties shall be commenced in a court of competent jurisdiction in any county not a party to the action."

Second. The statute of the State of Nevada referred to in and made a part of the complaints in these actions specifically names in section 19 thereof the court which shall have jurisdiction of all matters arising under said act and all litigation concerning the bonds and coupons issued by virtue of its authority. Said section is as follows: "The district court of Lincoln county shall have power to enforce obedience to the provisions of this act, and for that purpose shall have full power to issue process of mandamus, prohibition, and all other writs that may be required that are authorized by law."

(Statutes of Nevada, 1873, p. 58.)

Counties cannot be sued at all except by the express statutory consent of the sovereign State of which they are parts, and the conditions of such consent as to time, place, and courts must be strictly complied with by the party who would maintain such suits.

See cases cited *supra* and—

Gilman *vs.* Contra Costa Co., 8 Cal., 57.
Hunsaker *vs.* Borden, 5 Cal., 290.
Hastings *vs.* San Francisco, 18 Cal., 57.
F. S. W. Co. *vs.* Rives, 14 Nevada, 433.

In the latter case the court says: "It is conceded that without express authority from the Legislature a county cannot be sued, and that the right to maintain such suits can only be enjoyed upon the conditions which the Legislature sees fit to impose. It is also conceded that the only statute authorizing suits against counties in this State is the act of the territorial Legislature approved February 16, 1864." (Section 3667, General Statutes, cited *supra.*)

This is an authoritative and binding exposition of the litigious status of counties in the State of Nevada.

In the light of these authorities and from the fact that but one court is named or mentioned in the act the maxim of *expressio unius exclusio alterius* applies with peremptory force.

## II.

*The complaints do not state facts sufficient to constitute a cause of action, and cannot, therefore, support the judgment.*

First. The presentment of the bonds at the office of the treasurer of the county of Lincoln was an absolute prerequisite to the arising of any cause of action against the county upon them. There was no breach of the conditions of the bonds and could not be until after such presentment and a refusal to pay. This Court has repeatedly held that

municipal bonds were negotiable paper, but it has also repeatedly held in fact and in principle and analogy that the holder thereof is peremptorily bound by the provisions of the statute under which they were issued and is also bound to take notice of such provisions (McClure *vs.* Township of Oxford, 94 U. S. S. C., 429; Antony *vs.* County of Jasper, 101 U. S. S. C., 693). The statutes under which these bonds are alleged to have been issued provides as follows: "Said bonds shall be due and payable in gold coin at the office of the county treasurer of said county of Lincoln on or before the first day of January, one thousand eight hundred and eighty-three" (Statutes of Nevada, 1873, p 55, part of section 2). This amounts to a reservation in the grant of power to issue the bonds and a mandate to the holder thereof, a strict compliance with which can alone give him a cause of action. Being thus an essential fact to be proven it is an essential fact to be alleged in the complaint; and being a reservation in the grant of power to issue the bonds a compliance therewith could not be waived by the county or any one representing it.

Second. It was also a prerequisite to any right of action on the bonds and coupons that they should have been presented to the board of county commissioners and auditor of the county for action, either approval, rejection, or reduction of amount. No cause of action could arise without such presentment, and it follows that no cause of action is alleged in the complaint without an allegation of such presentment and the refusal of the board of commissioners or the auditor or both to allow the whole or part of such demands. Section 1950 of the General Statutes of the State of Nevada provides as follows:

"Every demand against the county, except the salaries of the auditor and district judge or judges, shall be acted on by the board of county commissioners and allowed or re-

jected in the order of presentation, and must, after having been approved by the board of county commissioners, before it can be paid, be presented to the county auditor to be allowed, who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury is authorized by law, and out of what fund. If he allow it he shall indorse upon it the word 'allowed,' with the name of the fund out of which it is payable, with the date of such allowance, and sign his name thereto and draw his warrant on the county treasury for the amount allowed. No demand shall be approved, allowed, audited, or paid unless each several item, date, and value composing it be indorsed upon the same by the order of the board of county commissioners, together with a reference to the law, order, contract, or authority by title, date, and section, authorizing the same."

Sections 1964 and 1966 of the said General Statutes provide as follows:

"SEC. 1964. No person shall sue a county in *any* case for *any* demand unless he or she shall first present his or her claim or demand to the board of county commissioners and county auditor for allowance and approval, and if they fail or refuse to allow the same or some part thereof the party feeling aggrieved may sue the county; and if the party suing recover in the action more than the said board allowed or offered to allow, said board and auditor shall allow the amount of said judgment and costs as a just claim against the county; but if the party suing shall not recover more than the board and auditor shall have offered to allow him or her, then costs shall be recovered against him or her by the county, and may be deducted from such demands."

"SEC. 1965. All unaudited *claims* or accounts against any county in this State shall be presented to the board of county commissioners of said county, duly authenticated, within six months from the time such *claims* or accounts

become due or payable, provided nothing contained in this section shall be so construed as to prevent the presentation and auditing of any claim now due against any county in this State at any time within nine months from the passage of this act."

"SEC. 1966. No *claim* or account against any county in this State shall be audited, allowed, or *paid* by the board of county commissioners or any other officer of said county unless the provisions of the last preceding section are *strictly* complied with."

The provisions of the foregoing sections have never been changed since the passage of the act of which they are a part, on the 8th day of March, A. D. 1865. The italics are ours. The provisions are mandatory: "No person shall sue a county in *any case* for *any demand* unless,," &c., giving the terms upon which he may sue a county, and unless he brings himself within these terms by the allegations of his complaint the complaint will not support a judgment, for they are essence of his right of action and cannot be waived by any one representing the county. The only way to avoid this conclusion is to say that the bonds and coue pons sued upon in this action are not "claims" or "de mands" against the county.

Champion *vs.* Sessions, 1 Nevada, 478.

There is no provision in the statute under which it is alleged these bonds and coupons were issued exempting them from the usual and general course of other claims and demands against a county, and if there was it would be void as contravening section 20, article IV, of the constitution of the State, which prohibits local or special laws "regulating county and township business."

They were not issued, if issued at all, by the board of county commissioners of the county of Lincoln, and hence do not come within the line of reasoning adopted in the

cases of The County of Green and County of Pickens *vs.* Daniels (102 U. S. S. C., 187), that the bonds had been issued by the auditing board, which amounted to an auditing thereof, and we suggest, with all due deference, that those cases certainly reached the limit of the principle, if it is a principle, of the nullification of general laws by special inferences. Further than this it is said in the opinion of this Court in the cases last cited that "a county in the State of Alabama is a body corporate capable of suing and being sued." Such is not the case in the State of Nevada. Counties in the latter State are not endowed with the powers and incidents of ordinary private corporations and can only sue and be sued under the provisions of the statutes hereinbefore quoted.

Third. *It appears from said complaints that said bonds and coupons are payable, if payable at all, from a specific fund provided therefor, and therefore an action of debt against the county at large cannot be maintained thereon.*

Section 10 of the act under which it is alleged said bonds and coupons were issued provides as follows:

"SEC. 10. It shall be the duty of the treasurer of said county to set apart a fund to be called the 'sinking fund of the county of Lincoln.' Into said fund shall be paid, first, any and all surplus of the interest fund as aforesaid. Each of said payments shall be continued until the said sinking fund shall be sufficient for the payment of the principal and interest of the bonds, and when the same shall be paid and liquidated the same shall cease, and all surplus remaining in the sinking fund shall be paid into the general fund of said county."

Section 21 of said act provides as follows:

"SEC. 21. At the first meeting in December in each year of the board of county commissioners of said county they may transfer any surplus money there may be in the gen-

eral fund of said county to the 'sinking fund' created by this act, provided there shall be left in the treasury a sufficient amount to defray the current expenses of said county for the six months next ensuing."

These sections and the whole purview of the act show that it was never intended by the Legislature that the bonds or coupons should be payable otherwise than from the interest and sinking funds. We call especial attention to the fact that it was not the intention of the act that the bonds should be issued for the purpose of raising funds to pay an indebtedness, and hence they were not to be placed upon the market by the county, and their commercial value was not of the least importance to the county. These cases are therefore outside of the reasoning of the court in the case of the United States *vs.* County of Clark (96 U. S. S. C., 211), and we call further especial attention to the fact that the contract embodied in the bonds themselves crystallizes the intent of the Legislature as interpreted by those who assumed to act for the county in the words following the promise to pay—*i. e.*, "*in the manner provided by said act*"—that is to say, so far as the bonds were concerned from the sinking fund therein provided, and so far as the coupons were concerned from the interest fund therein provided.

These facts negative the idea that an action of debt could be maintained against the county, the correctness of which conclusion is further substantiated by the provisions of sections 18 and 19 of said act, which makes it a criminal offense for the officers of said county to neglect or refuse to comply with the requirements of the act and giving to the district court of Lincoln county full power and jurisdiction to enforce obedience to the provisions of the act and to issue extraordinary processes therefor.

Fourth. *It is not alleged in said complaints nor does it appear thereby that said county of Lincoln was authorized by the Legis-*

*lature of the State of Nevada to issue the bonds or coupons sued upon.*

This Court says in Anthony *vs.* County of Jaspar (101 U. S. S. C., 697): "Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power no legal liability can be created."

Assuming for this point that the "board of commissioners to be known and styled as the funding commissioners of the county of Lincoln of the State of Nevada" was legally created, the powers conferred upon them do not embrace the power to *issue* bonds, but only to *prepare* them.

The following sections and parts of sections of the act referred to in the complaints in this action (chap. XIII, p. 54, Statutes of Nevada, 1873) contain all the powers granted to said board, both positive and inferential:

"SECTION 1. In order to consolidate and fund the entire indebtedness of the county of Lincoln for which certificates of indebtedness have been issued and place all of its financial transactions upon a cash basis the chairman of the board of county commissioners, the auditor, the county treasurer of said county, and their successors in office shall constitute and are hereby created a board of commissioners to be known and styled as the funding commissioners of the county of Lincoln, State of Nevada, *and shall have and exercise the powers hereinafter provided.*" (The italicising is our own.)

"SEC. 2. It shall be the duty of said funding commissioners to *cause to be prepared* bonds equal to the present county indebtedness, together with all the indebtedness that shall have accrued for which warrants have or may be issued before the first day of March, A. D. one thousand eight

hundred and seventy-three. Said bonds shall be of the denomination of one hundred, three hundred, and five hundred dollars, and each and every bond *purport in substance* that the county of Lincoln, State of Nevada, owes the holder thereof a sum to be expressed therein, bearing interest at the rate of ten per cent per annum from the first day of March, A. D. one thousand eight hundred and seventy-three, the interest to be paid upon presentation at the office of the county treasurer on the first day of January, one thousand eight hundred and seventy-four, and on the first day of January annually thereafter until said bonds are paid and liquidated. Said bonds shall be due and payable in gold coin, at the office of the county treasurer of said county of Lincoln, on or before the first day of January, one thousand eight hundred and eighty-three. Said bonds shall be signed by the chairman of the board of county commissioners of said county and countersigned by the county auditor and endorsed by the county treasurer and shall have the seal of the county affixed thereto."

This section certainly cannot be construed as giving any authority to the county of Lincoln to *issue* bonds. Even the signatures of the county officers named must be construed as the signatures of the "funding commissioners" and the official designation as *descriptio persona*.

No authority whatever is given to any county official except as "funding commissioners," and they are given no authority to issue bonds for the purpose of funding the indebtedness of the county or for any other purpose.

The only provisions of the act relative thereto are prohibitory. Section 3 of the act reads as follows: "Sec 3. It shall be the duty of said funding commissioners to keep an account of the number, denomination, and amount of all bonds *signed* by them in accordance with this act, and it shall be the duty of said commissioners to examine all certificates of indebtedness presented for funding and ascertain

if they are the true and correct ones issued according to the county treasurer's and auditor's books corresponding to the entries therein, and *no others* than those found to be true and lawful ones against the county of Lincoln *shall be funded.*"

There is certainly no authority given here to fund *any* of the named certificates. The commissioners are *prohibited* from funding those of a certain class, and it would be anomalous to hold that a *prohibition* gives an authority.

Ogden *vs.* Daviess, 102 U. S. S. C., 641.

Fifth. *It is not alleged in said complaints nor does it appear thereby that said county of Lincoln ever issued as its act and deed any of the bonds or coupons sued upon in said action.*

Assuming that it is in words alleged that the county of Lincoln issued the bonds and coupons, yet it is shown by the act, which is referred to and made a part of the complaints that the county did not issue them, but that they were, to all legal intents, surreptitiously put in circulation. This point rests upon the quotations from the statute and authorities in point "four."

Sixth. *It is shown by said complaints that the act of the Legislature of the State of Nevada referred to therein and made a part thereof is void as being in contravention of the constitution of said State of Nevada, in that* (1) *the subject of said act is not expressed in the title thereof and* (2) *the said act attempts to create and inject into the government of the county of Lincoln* (*the plaintiff in error*) *a board of officers unknown to and unrecognized by the constitution and which is not created or provided for any other county in the State, and imposing duties upon and granting powers to such board which are anomalous and extraordinary.*

(1.) The constitution of the State (article IV, section 17) provides that "each law enacted by the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title," &c.

The title to the act in question is "An act to consolidate and fund the indebtedness of Lincoln county."

Section 1 of said act commences as follows: "In order to consolidate and fund the entire indebtedness of the *county of Lincoln* for which certificates of indebtedness have been issued *and place all of its financial transactions upon a cash basis*," &c.

It cannot be contended that "Lincoln county" designates the same legal entity as the "county of Lincoln" with any more reason than it could be contended that the "Yuba Mining Company" designates the corporation created and organized as the "Mining Company of Yuba."

Dow *vs.* Hubert, 91 U. S. S. C., 294.

"The county of Lincoln" was created by an act of the Legislature of the State of Nevada approved February 26, 1866, entitled "An act to create the county of Lincoln and provide for its organization," the first section of which commences as follows: "All that portion of the State of Nevada within the following boundaries shall be the county of Lincoln, viz.," &c.

Statutes of Nevada, 1866, p 13.

This act of creation has never been changed so far as the name of the creature is concerned.

The placing the financial transaction of a county upon a cash basis is not germane to nor properly connected with the consolidation and funding of its indebtedness.

Neither is the provision in section 6 of said act for the payment of a part of the indebtedness in coin.

These provisions are broader than the scope of the title, even if the title is correct in any respect, and are so intimately blended with the other provisions of the act that they cannot be separated, and the whole is thereby nullified.

Cooley Const. Lim., 149.

State *vs.* Silver, 9 Nevada, 227.

State *vs.* Hallock, 19 Nevada, 384.

(2.) The constitution of the State of Nevada provides as follows in article IV thereof, entitled "Legislative Department:"

"SEC. 20. The Legislature shall not pass local or special laws in any of the following enumerated cases—that is to say, * * * regulating county and township business. * * *

SEC. 21. In all cases enumerated in the preceding section and in all other cases where a general law can be made applicable all laws shall be general and of uniform operation throughout the State. * * *

SEC. 25. The Legislature shall establish a system of county and township government which shall be uniform throughout the State."

In our opinion it only requires an inspection of the act in question to show conclusively that it is both local and special and comes directly within the proscript of sections 20 and 21 of the constitution quoted *supra*. The opinions of the supreme court of the State do not, however, seem to be harmonious in its construction of these sections.

This want of harmony evidently arose from a forced construction by the majority of the court in Youngs *vs.* Hall (9 Nev., 212) and the dissenting opinion of Justice Hawley therein, the reasoning of which has been subsequently followed by the court in the cases of the State of Nevada *vs.* California Mining Company (15 Nevada, 248 *et seq.*) and State *vs.* Consolidated V. M. Co. (16 Nevada, 438 *et seq.*).

This Court is not therefore bound by any construction of these sections by the supreme court of the State of Nevada, but can consider the question here raised as *res integra*.

But be this as it may, according to the definition of a "special law" by the court in the State *vs.* Cal. M. Co. (15 Nevada, 249), to wit, "but whenever the question has been presented in this court or any other court, so far as our observation has extended, it has always been agreed that a law which applies only to an individual or to a number of in-

dividuals selected out of the class to which they belong is a special and not a general law." The act in question is in contravention of said sections of the constitution from the fact that in section 6 thereof certain of the creditors of the county are prohibited from funding their certificates of indebtedness. As we shall refer to this section again we quote in full—

"SEC. 6. All persons having any certificate of indebtedness of the county of Lincoln payable on or before the first day of March, one thousand eight hundred and seventy-three, whether in certificates drawn upon the treasurer or account audited and allowed by the board of county commissioners before the first day of March, one thousand eight hundred and seventy-three, shall be entitled to fund the same by virtue of this act: *Provided*, That for any fractional sum less than the amount of the bonds authorized to be issued by this act said commissioners shall issue to the holder of the county warrant, or such other evidence of indebtedness as may have been audited or allowed by the board of county commissioners, a certificate of such fractional sum, and upon presentation of the same to the county auditor he shall draw a warrant upon the county treasurer for the amount so certified, and said warrant thus drawn must be presented to the treasurer of said county within eight months after the first day of March, one thousand eight hundred and seventy-three, and said warrants shall be payable in coin, in their regular order of payment, according to the number and date thereof."

The proviso in this section, whether ignored or enforced, renders the act unconstitutional. If enforced according to the strict letter of the law no certificate of less amount than "the amount of the bonds authorized to be issued" could be funded; and if ignored no one holding a certificate of indebtedness in an amount varying from the denomination of the bonds could fund it.

To guard against such loose legislation was the object of the constitutional provisions hereinbefore quoted; and if the Legislature cannot express itself it is not the province of the judiciary to supply the legislative omission or to seek for a meaning where none is expressed in the statute.

Cooley on Const. Lim., 129.

That the act in question is in clear violation of section 25, article IV, of the constitution of the State, hereinbefore quoted, seems to be apparent upon its face. The first section *creates* a "board of commissioners" to be known and styled as the funding commissioners of the county of Lincoln, State of Nevada;" and although certain officers of the county and their successors are named as constituting such "board," yet as such officers they had no new authority, and everything in relation to the bonds and coupons in suit was done and could only be done as such "funding commissioners," and provided for the election of their successors in such office. How can the uniformity of a system of county government be maintained if one set of officers with special powers is provided for one county and another set of officers with special powers provided for another? There is no attempted classification of counties which may be entitled to boards of "funding commissioners," but the "county of Lincoln" is solely and explicitly named as meriting this peculiar distinction and honor.

The supreme court of the State of Nevada has decided in State *vs.* Boyd (19 Nevada, 43) that acts of this character are unconstitutional as contravening said section 25. The act in that case only sought to consolidate the offices of treasurer and assessor in the county of Washoe, and the court says: "In obedience to the requirements of the constitution the Legislature of 1886, in dealing with the general subject of county governments, provided, among other things, for the election of a county assessor and a county treasurer for each county in the State. This legislation remains in effect in each

county, unless the act of 1883 exempting Washoe county from its operation and consolidating these offices in the county can be upheld. *It is too clear for argument or controversy that a legislative act arbitrarily establishing this plain difference in the government of Washoe county from that of the other counties of the State violates the system of uniformity contemplated by the constitution. No elaboration of the proposition can make it plainer than the simple statement of the facts.*"

This fills the full measure of our contention upon this point, and when the constitution of a State has been construed by the highest court in the State such construction is followed by this Court.

Township of Elmwood *vs.* Marcy, 92 U. S. S. C., 289.
Hall *vs.* De Cuir, 95 U. S. S. C., 487.

III.

*The said circuit court erred in not sustaining the pleas of the statute of limitations to the coupons set forth in said answers of said plaintiff in error.*

Each coupon is a separate and independent contract of itself, and the statute of limitations begins to run against it from the day of its maturity.

Amy *vs.* Dubuque, 98 U. S., 470.
Koshkonong *vs.* Burton, 104 U. S., 668.
Nash *vs.* Eldorado County, 11 Sawyer, 86.

At the time the bonds were issued the time of the statute of limitations applicable to the bonds and coupons was four years.

Com. Laws of Nev., 1031.

In 1877 the time was extended to six years, but with an express provision that the extended time should not apply to contracts previously made.

Statutes of Nev., 1877, p. 114, sec. 3.
Gen. Stats. of Nev., sec. 3646.

All of the coupons except those numbered 10 on the bonds are barred by the statute.

Defendants in error contend that the amendment of 1877 (Stats. of Nev., 1877, p. 46) to section 9 of the original act under which the bonds were issued provides for some additional registration of the unpaid coupons, and as to them suspends the statute of limitations.

Section 3 of the original funding act provides that "it shall be the duty of said funding commissioners to keep an account of the numbers, denomination, and amount of all bonds signed by them in accordance with this act."

We fail to find in the amendment to section 9 of 1877 any further provision for any formal registration of the coupons or any intention on the part of the Legislature to suspend the operation of the statute of limitations.

An inspection of the amendment of 1877 will show that the sole object of the Legislature was to provide for the payment of the coupons in their regular order; that if in any given year the interest fund should be insufficient to pay all coupons the treasurer should issue a certificate to that effect to the holders of the unpaid coupons, and thereafter those unpaid coupons should be first paid; that no coupon should be paid to the exclusion of one longer overdue. It is manifest that the Legislature never intended or expected that any coupon should remain unpaid but a short time. An annual levy of a tax was provided for which was thought to be sufficient to pay the interest and provide a sinking fund for the payment of the principal.

Secs. 8, 9, and 10, Stats. 1873, p. 56.

Provisions were made for the transfer of moneys from the general fund to the interest fund. (Sec. 21, p. 58.)

Plaintiffs claim that they were *lulled* into inactivity by the amendment of 1877. They were *too easily* and not *legally lulled*.

The amendment held out no inducement and made no

promise not contained in the original funding act. The amendment contained no suggestion that they should forbear or had not the right to sue upon their coupons as soon as they were overdue and unpaid. The true test is that whenever the right to sue exists the statute of limitations runs.

Amy *vs.* Dubuque, 98 U. S., 474.

Neither the Legislature nor the county of Lincoln has done anything looking to the payment of the coupons since the amendment of 1877 and the certification of unpaid coupons under it.

Nothing has been done to remove the bar which has since been cast upon the coupons.

Wilcox *vs.* Williams, 5 Nev., 206.

Taylor *vs.* Hendrie, 8 Nev., 245.

Defendants in error claim at the time of the bringing of these suits and at all times prior thereto there was no money in the interest fund of Lincoln county which was applicable to the payment of any of the coupons in suit.

This is true; but it occurred, and could only occur, by the officers of Lincoln county neglecting and refusing to levy the tax and pay the coupons, as provided in the funding act.

The act provided the bondholders an ample remedy against such neglect and refusal in addition to their right to bring suit upon their coupons (sec. 19, Stats. 1877, p. 58). Plaintiffs could have brought any one of several forms of action to enforce their rights during all of the time the statute of limitations was running.

There seems to have been more extenuating circumstances, if such could count for anything, to excuse plaintiffs from bringing suit in Nash *vs.* Eldorado County, *supra*, than in the cases at bar.

The case of Freehill *vs.* Chamberlain (65 Cal., 603), relied upon by defendants in error, is not in point.

In that case it was provided by statute that no suit should ever be brought upon the bonds or coupons of the city of Sacramento, but that they should be paid as funds came into the treasury.

Consequently the statute of limitations cut no figure in the case, and could never begin to run.

The court held that under these facts the city could not create for itself the defense of the statute of limitations by refusing to levy the tax and bring money into the fund for the payment of the coupons.

If the case of Underhill *vs.* Trustees of Sonora (17 Cal., 177), also relied upon by defendants in error, can be construed to hold that, where there is a continuing provision for the payment of bonds and coupons by a continuing annual levy of a tax, there is a continuing acknowledgment of the obligation and a continuing new promise to pay it, it stands alone. However, we think no such ruling was intended in that case.

The bonds of Sonora were payable *two* years after their date. After the maturity of the bonds, and when they were almost or quite barred by the statute, the Legislature of California passed an act making further provision for the payment of the bonds, extending several years beyond the time when they would otherwise be barred, thus clearly manifesting an intention to pay and making provision for payment regardless of any limitations.

I respectfully submit that all the coupons except the last on each bond are barred by the statute of limitation.

## IV.

*Said judgments are absolutely void as being against a defendant which never had an existence.*

No such legal entity as "Lincoln County" exists in the State of Nevada. (Subdivision sixth, point II, of this brief.)

A void judgment may be reviewed and declared void by an appellate court, even though entered by consent. (Hastings *vs.* The Burning Moscow Company, 2 Nevada, 93, and cases cited in opinion.)

It is therefore respectfully submitted that the judgments in these cases should be reversed, with instructions to the circuit court to dismiss the action.

H. F. BARTINE,
*Attorney for Plaintiff in Error.*

FILED.
JAN 24 1880
JAMES. H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

*Nos. 1274, 1275, 1276.*

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

CHARLES SUTRO, DEFENDANT IN ERROR.

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

NICHOLAS LUNING, DEFENDANT IN ERROR.

THE COUNTY OF LINCOLN, PLAINTIFF IN ERROR,

*vs.*

C. D. VINCENT, DEFENDANT IN ERROR.

## BRIEF OF DEFENDANTS IN ERROR.

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*vs.*

C. D. VINCENT, DEFENDANT IN ERROR.

## BRIEF OF DEFENDANTS IN ERROR.

### STATEMENT.

The action is based upon certain bonds and coupons executed by the plaintiff in error, pursuant to an Act of the Legislature of the State of Nevada, approved February 17th, 1873. Both the defendants in error and their respective assignors were citizens of States other than Nevada. (See

Subdivision "A" of Complaints and Subdivision "C" as amended, Transcript p. 6.) The respective coupons were presented for payment as required by the Act of the Nevada Legislature, approved January 18th, 1877. The complaints were verified. The only averments of the complaint denied by the answer are those in Subdivision "D," relating to the transfers of the causes of action to the defendants in error. The Court found against the plaintiff in error on this issue. (See Finding II., p. 7.)

Before answering, however, the plaintiffs in error had demurred to the complaint, in which demurrer the jurisdiction of the Court was challenged on the same grounds now invoked in this Court. The demurrer received the very careful opinion of the presiding Judge, which may be found reported in full in Vol. 30 of the Federal Reporter, pp. 749 to 754.

## ARGUMENT.

### I.

*The Circuit Court had jurisdiction both of the subject matter of the action and of the parties thereto.*

None of the cases mentioned on page 5 of the brief of plaintiff in error considered the proposition in support of which they are cited. The following, however, are in point and they fully establish the proposition that a county is subject to suit in the National Courts:

Lyell *vs.* Lapeer County, 6 McLean, 446.
McCoy *vs.* Washington County, 3 Wall. jr. 381.
Cowles *vs.* Mercer County, 7 Wall. 118.
McPike *vs.* Lincoln County, 7 Cent. L. J. 264.
Cunningham *vs.* County of Ralls, 1 Fed. R. 453.
Jordan *vs.* Cass County, 3 Dill. 185.

The plaintiff in error manifestly exercises all the powers and possesses all the attributes of a corporation. It was organized pursuant to an Act of the Legislature of Nevada,

approved February 26, 1866, (St. Nev. 1866, p. 131) and became vested with the same powers as other counties in that State. By the constitution of the State, counties were recognized as corporations, for Section 10, Art. VIII, states that "no county, city, town, *or other municipal corporation*, shall become a stockholder in any joint-stock company"; and Section 5 of the same article declares "that corporations may sue and be sued in all Courts in like manner as individuals." By Sections 25 and 26, of Article IV, it was made the duty of the Legislature to establish a system of county and township governments, and to provide by law for the election of county commissioners in each county, who should perform such duties as might be prescribed by law. In obedience to the mandate of the Constitution, the Act to create a Board of County Commissioners was passed March 8th, 1865 (St. 1865, p. 257.) The powers conferred on the County Commissioners by Section eight, are necessarily powers to be exercised by them as agents or representatives of the county, and are therefore powers *possessed by the county*, which they represent. Those powers include everything necessary to a corporate body, and are more extensive than the powers possessed by the Levy Court referred to in Second Wallace 502 or by the Levee District, considered in *Dean* vs. *Davis*, 51 Cal., 410. That a county could sue and be sued is evident, not only from the ample powers given to and the duties devolved upon it, but also from the provisions of Section 24, prohibiting a suit until the demand had first been presented to the Commissioners, and the enumeration of the powers of Commissioners in Section 8, the twelfth of which was "to control the prosecution or defense of all suits to which the county was a party."

In our judgment the right to sue a county of Nevada is necessarily conferred by Sections 8 and 24 of this Act of March 8, 1865. No other act upon the subject was ever passed by the State Legislature. It is true that there is a statute, enacted by the Territorial Legislature July 16, 1864, declaring that "actions against a county may be com-

menced in the District Court of the Judicial District embracing such county."

While this statute may be regarded as still in force, so far as to permit suits against counties, Waitz *vs.* Ormsby County, 1 Nev. 370, it cannot operate as a designation of the Courts in which these suits may now be brought, because the Courts named in that statute are the old Territorial Courts, which ceased to exist when Nevada became a State. Referring to suits against counties, and affirming the jurisdiction of Justice's Courts, where the amount sought to be recovered was less than $300, the Supreme Court of Nevada, considering the statute of 1864, and the prior decisions thereunder said: "But it was not held, and could not have been held, that the jurisdiction of such actions continued as therein prescribed. The Courts then in existence have been abolished, and the jurisdiction of the new Courts which were erected in their place has been regulated by constitutional provisions, applicable to all kinds of actions. Under those provisions, the jurisdiction of an action against a county is determined by the same rule that determines the jurisdiction of actions against natural persons." F. S. W. Co. *vs.* Rives, 14 Nev. 434. The defendant is, therefore, entirely mistaken in its assumption that the laws of Nevada designate or limit the Courts in which counties may be sued. If the statute of 1864 is in force for the purpose of designating Courts, then it forbids resort to the State Courts, for the Courts there designated were United States Courts. (See 14 Nev. 434.)

If the defendant's position were correct, no action could ever have been maintained in the National Courts against counties; for the defendant's whole argument is that a county can only be sued in such Courts as the State may designate.

But a State, in creating Courts and conferring or limiting their jurisdiction, must always be understood as speaking of State, and not of national tribunals. State statutes authorizing counties to be sued have never purported to authorize such

suits to be brought in any other than the State Courts; and yet the right to bring such actions in the National Courts has never been seriously questioned. This is because the creation of a county, and the vesting it with certain corporate powers, including the right to sue and be sued is necessarily the creation of an artificial person, jurisdiction over whom is controlled by the laws respecting jurisdiction over natural persons resident in the same State.

It is upon this ground, and the further ground that the county is but another name for the citizens thereof, that jurisdiction over counties has been sustained, and not upon any peculiar phraseology in the statute, nor because the statute in set terms designated the body in question as a corporation. Thus, in a case heard by Mr. Justice Grier, while presiding in the 3d Circuit, he said:

"It is contended that the County of Washington, being merely a subordinate political division of the State of Pennsylvania, is not a citizen of this State, within the meaning of the Constitution or the Act of Congress, and therefore, not suable in this Court. To this we answer, that though the metaphysical entity called a corporation may not be physically a citizen, yet the law is well settled, that it may sue and be sued in the Courts of the United States, because it is but the name under which a number of persons, corporators and citizens, may sue and be sued. In deciding this question of jurisdiction, the Court looks behind the name to find who are the parties really in interest. In this case the parties to be affected by the judgment are the people of Washington County. That the defendant is a municipal corporation, and not a private one, furnishes a stronger reason why a citizen of another State should have his remedy in this Court, and not in a county where the parties against whom the remedy is sought would compel the Court and jury to decide their own case. This point is therefore overruled."

McCoy *vs.* Washington County, 3 Wall. jr. 385.

So far as we know, this question has been directly considered in the Supreme Court of the United States only in this case of Cowles *vs.* Mercer County, 7 Wallace, 118.

The Court said: "But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the Circuit Courts of the County. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that Court has never decided that a county in Illinois is exempted from liability to suit in the National Courts. It is unnecessary, therefore, to consider the effect of such a decision. It is enough for this case that we find the Board of Supervisors to be a corporation, authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat jurisdiction given by the Constitution. We cannot doubt the constitutional right of the defendant in error to bring suit in the Circuit Court of the United States upon the obligations of the County of Mercer against the plaintiff in error."

Cowles *vs.* Mercer Co. 7 Wall. 122.

Since the decision in this case the right to sue a county in the National Courts, though repeatedly exercised, has never been questioned.

Adams *vs.* County of Republic, 23 Fed. R. 211.
Wall *vs.* Monroe Co. 103 U. S. 77.
Loan Association *vs.* Topeka, 20 Wall. 955.
Cromwell *vs.* County of Sac., 94 U. S. 351.

Certainly, the provision of the Act of 1873 giving the District Court of Lincoln County power to enforce obedience to the act and to issue all writs necessary therefor, is not relevant to any question now before this Court. The Act referred to is one authorizing the funding of the debt and the issueing of bonds; and the section cited was not a limi-

tation of the powers of any State or National Court. If any officer had refused to do any official act imposed on him by the statute, or had exceeded his jurisdiction by doing some act in addition to the acts required of him, the District Court, in the one case, would have accelerated his tardy movements by a writ of mandate, and in the other would have restricted his assumptions of authority within their proper channel. But the statute, so far as we know, was complied with; and we are not seeking any writ against any officer to compel the performance of official duty. We merely wish to convert our various bonds and coupons into a judgment against the county, and thereby to entitle ourselves to further remedies in the National Courts, to which a judgment is indispensable.

County of Green *vs.* Daniel, 102 U. S. 195.

Lincoln County, as we have shown, was one of several counties, all of which possessed the essential attributes of a corporation, and all the corporators were residents of Nevada. Each county had a corporate name, and was endowed with immortality as far as any corporation can be. It was also vested with numerous powers possessed only by natural or artificial persons, and especially with the power of suing and being sued. The courts in which it could be sued were not specially designated, for the courts originally selected had ceased to exist. The only statute on the subject might therefore be truly interpreted as declaring "this and nothing more," that a county may sue and be sued in like manner as other persons and corporations.

F. S. W. Co. *vs.* Rives, 14 Nev. 434.

The Act authorized the issue of the bonds and coupons here sued upon, and directed them to be made in the form of negotiable instruments, obligating the county to make payment of specified sums at the dates named. These obligations might be issued directly to aliens or non-residents, or transferred to them by mere delivery. Under such

circumstances, the holders of these bonds and coupons are entitled to their remedies in the National Courts. We challenge the production of any statute attempting to restrict suits against counties to the present courts of the State of Nevada. If such a statute could be produced, then we should confront it with this language of Chief Justice Chase, in Cowles *vs.* Mercer County: "The power to contract with citizens of other States implies liability to suits by citizens of other States, and no statute limitation of suability can defeat jurisdiction given by the Constitution."

The fact that the defendant in error has not been styled a corporation, in express terms, is immaterial. Whether an artificial body is a corporation or not, is to be determined by ascertaining its powers and attributes. Considered in the light of this test, Lincoln County is a corporation.

Angell & Ames on Corporations, Secs. 14, 23, 164.
Dillon on Mun. Corp. Sec. 22.
L. & N. R. R. *vs.* County Court, 1 Sneed, 687.
Shawnee County *vs.* Carter, 2 Kans. 128.
Price *vs.* County of Sac. 6 Cal. 256.
Levy Court *vs.* Coroner, 2 Wall. 501.
Davis *vs.* Davis, 51 Cal. 406.

## II.

*The complaint did state facts sufficient to constitute a cause of action.*

Presentment of the bonds and coupons at the office of the County Treasurer was not a pre-requisite to the suit. (*a*) The complaint shows that such presentment would have been a vain act, for it alleges in subdivision "E" that at no time has there been any funds with which to make payment either of bonds or coupons, and the allegation is not denied. (*b*) As to the coupons, presentment is alleged. (*c*) It is the well-settled American rule that, though a negotiable instru-

ment is payable at a particular time and place, yet no presentment at such time or place need be alleged or proved to charge the maker, "and that it is a matter of defense on the part of the maker or acceptor to show his readiness with the funds at the time and place, and the omission or neglect of the plaintiff to present the paper for payment; and such defense will be only a bar of the damages and costs, and not of the debt."

Montgomery *vs.* Tutt, 11 Cal. 318.
Wolcott *vs.* Van Santvoord, 17 Johns. 248; 8 Am. Dec. 396.
Wallace *vs.* McConnell, 13 Pet. 136.
Hills *vs.* Place, 48 N. Y. 520; 8 Am. R. 568.
Daniel on Neg. Ins'ts. Sec. 643.
McNairy *vs.* Bell, 1 Yerg. 502; 24 Am. Dec. 454.

Presentment of the bonds and coupons to the County Commissioner and Auditor was unnecessary. Sections 1950, 1964, 1965 and 1965 of the General Statutes of Nevada, referred to in the brief of plaintiff in error, manifestly refer to unaudited claims against the county. These bonds and coupons had passed beyond the preliminary state of claims or demands, and had ripened into settled liabilities regarding which the county had no further power than to provide means for payment. A similar defense was made and overruled in Meyer *vs.* Porter, 65 Cal. 70; County of Green *vs.* Daniels, 102 U. S. 187.

It is not true that it appears either from the complaint or from the bonds and coupons that they are payable only from a specific fund provided therefor. It is true that the Act of 1873, (Statute 1873) in Section 8, declares that, in addition to ordinary taxes for county purposes, there shall be for the year 1873, and annually thereafter until the principal and interest of said bonds to be issued shall be fully provided for, be levied and collected in the same manner as other revenues, a special tax to be called an interest tax, and that the fund provided from this tax shall be applied only to the

payment of the interest accruing upon said bonds, unless there should be a surplus after paying interest, in which event the surplus should be paid into the sinking fund. But Section 9 further makes it the duty of the County Treasurer to make arrangements for the payment of the interest of said bonds at least thirty days before the time of payment; that in the event that the interest fund is insufficient, that he shall draw on the general fund, and if that should prove inadequate, he is authorized to make such contracts and arrangements as may be necessary for the payment of interest. While these funds are provided for the benefit of the bondholders, there is certainly nothing in the act precluding them from resorting to other remedies, in case the funds prove insufficient. But even if there were a special fund to which the bondholders were limited, it might still be necessary for them to maintain actions upon their bonds. The county officers may not be doing their duty with respect to such funds, and may have failed either to levy the proper taxes or to pay the taxes, when collected, into the proper funds. It is, therefore, necessary that the bondholders recover judgment, in order that they may make such judgment a basis for applications in the nature of writs of mandate to compel the discharge of the duties imposed upon the county officers by statute.

That the plaintiff in error made, executed and delivered the bonds and coupons in controversy, under and pursuant to the statute of 1873, is averred in the complaint and admitted by the answer. Counsel say that the only powers of the Funding Commissioners under the act, was to cause bonds to be prepared. But the act must be construed as a whole. It provides for funding the entire pre-existing indebtedness of the county; it states what shall be the denomination of each bond, and what promises it shall contain; that the bonds shall be signed by the Chairman of the Board, countersigned by the Auditor and endorsed by the Treasurer; that the Commissioners shall keep an account of the number, amount and denominations of the bond signed

by them; that "it shall be the duty of the Auditor and Treasurer to keep a separate record of all such bonds as may be *issued* in accordance with this Act." It is true the statute does not say in direct terms that the bonds when prepared shall be issued to any person; yet they were doubtless not intended as works of art, valuable only for their beauty; but were to be issued to such persons as would surrender pre-existing evidence of indebtedness therefor.

We confess our inability to understand the point attempted to be made as Subdivision 6th, on page 14, of the brief of plaintiff in error. The first part of it seems to consist of the assertion that because the statute of 1866 spoke of the County of Lincoln, it was ever thereafter beyond the constitutional authority of the Legislature of the State to use the expression "Lincoln County," and that therefore a statute which purported to legislate regarding the affairs of Lincoln County, could by no possibility be made to apply to the County of Lincoln. The title of the act is sufficiently comprehensive to include each and all of the provisions of the act itself, and there can be no doubt that the words "Lincoln County" in the title sufficiently expressed the idea that the indebtedness thereon referred to was that of the County of Lincoln. Besides, the validity of the bonds and coupons was not questioned at the trial of the case in the Court below, and has been directly sustained by the Supreme Court of Nevada. (Odd Fellows S. & C. Bank *vs.* Quillen, 11 Nev. 109.) The constitutionality of the statute in question was expressly affirmed in the last-named decision. That decision in turn followed the previous decision of the same Court in Youngs *vs.* Hall, 9 Nevada, 212. This last decision has never been overruled in the State of Nevada. On the contrary, all the Judges of the State purport to regard it as binding upon them. The substance of the decision in Youngs *vs.* Hall is well stated in the following extract from the opinion of Chief Justice Leonard in State *vs.* Consolidated V. M. Co., 16 Nev. 439: "Youngs

*vs.* Hall decided that the Acts of 1867–1869, to provide for the payment of Esmeralda County indebtedness were not special laws, for the reason that they operated alike upon all persons similarly situated, whether residing in the county or out of it; that is to say, upon all creditors of the county, and that a law so operating need not apply to all the counties of the State in order to be general."

III.

In considering the third point of the brief of plaintiff in error, it will be proper to refer more particularly to the statutes of Nevada, regarding the bonds and coupons here in suit.

The funding Act under which the bonds in suit were issued provided (among other things) as follows: "Said "bonds shall be of the denomination of $100, $300 and "$500, and each and every bond purport in substance that "the County of Lincoln, State of Nevada, owes to the "holder thereof, a sum to be expressed therein, bearing "interest at the rate of ten per cent. per annum, from the "First day of March, A. D. 1873; the interest to be paid "upon presentation at the office of the County Treasurer, "on the First day of January, 1874, and on the First day "of January annually thereafter, *until said bonds are paid "and liquidated.* Said bonds shall be due and payable in "gold coin at the office of the County Treasurer of said "County of Lincoln, on or before the First day of Janu-"ary, 1883."

Statutes of Nevada, 1873, p. 54, Sec. 2.

In pursuance of this Act the bonds in suit were issued. Each bond was dated March 1st, 1873, and fell due January 1st, 1883. To each bond were attached coupons to represent the annual interest, and the last coupon was for the interest due at the date of the maturity of the bond.

In 1877, the County of Lincoln was delinquent in its

interest, and the Legislature passed an Act amendatory of the original funding Act above referred to.

This amendatory Act provided jor the registration of over due coupons, and imposed upon the Treasurer, the duty of thereafter paying the coupons (as money came into his possession applicable therefor) in the order of their registration.

Statutes of Nevada, 1877, page 46.

The coupons numbered 5, 6, 7, 8 and 9 (which plaintiff in error claims are outlawed) fell due on January 1st, 1878, 1879, 1880, 1881 and 1882, and were presented as they fell due to the Treasurer of defendant for payment, and payment demanded and refused because the interest fund was exhausted. The Treasurer, as the coupons in suit were presented, registered them as provided in said Act of 1877.

At the time of the bringing of these suits, and at all times prior thereto, there was no money in the interest fund of defendant which was applicable to the payment of any of the coupons in suit.

(See subdivision "E" of plaintiff's complaint.)

This averment is not denied by defendant.

An Act of January 18, 1877, which provides for the registration of overdue coupons, and their payment thereafter in the order of their registration, exempts them from the operation of the Statute of Limitations. This Act was complied with as to all the coupons in suit. It was accepted and acted on by both debtor and creditor. It amounted to a promise on the part of Lincoln County to pay coupons as fast as money came into the fund, and to pay them in the order of their registration, provided they were presented within one year after due. This promise the creditors had a right to accept, and they having accepted it, the defendant can not now say that they were wrong in acting upon it, but should have sued:

Nash *vs.* El Dorado Co. 24 Fed. Rep. 255.
Underhill *vs.* Trustees of Sonora, 17 Cal. 177.
Freehill *vs.* Chamberlain, 65 Cal. 604.

The case of Underhill *vs.* The Trustees of Sonora deserves special mention and attention. It was decided in 1860. The bonds sued upon were made and dated in 1853, and were due in ten years after their date. But after they became due sundry statutes were enacted, all recognizing their continuing force, and requiring the trustees to levy taxes for their liquidation. This, said the Supreme Court, "is equivalent to a trust deed by the city, setting apart property out of which the money due was to be paid at a given time, if not sooner paid, upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute merely because the creditor waited after this for his money. The plea of the statute, if successful, would, under these circumstances, be nothing less than an act of unqualified repudiation of a just and honest obligation, to the payment of which the faith and credit of the defendant are pledged."

Now the act here adjudged to prevent the operation of the Statute of Limitations was merely one which in substance provided that if the public debt should not be liquidated at the end of three years, the trustees should have power to levy a tax sufficient to pay it. The decision was doubtless correct. For, while the city officers were by law obligated to provide means for the payment of the debt, the creditors had a right to rely upon this legal obligation.

Many, perhaps a majority, of the legislators and citizens of Nevada, had been residents of California and were conversant with its statutes and the interpretation given them by its Courts. A statute enacted in Nevada would therefore be expected and intended to be given the same interpretation given like statutes in California. The original Act, under which plaintiff's bonds and coupons were issued (Statutes 1873, p. 56,) like the Act construed in Underhill *vs.* Trustees of Sonora, operated as trust deed in favor of the holders of the coupons, in this, that it, by Section 8, pro-

vided for a perpetual special tax of forty-five cents on each $100, the proceeds of which should be set aside for the payment of the interest on said bonds. This was supplemented by the amendment (Statutes 1877, p. 46,) under which holders of coupons were authorized to procure their registration by the County Treasurer, after which it was his duty to pay them in the order of their registration "from the first money subsequently coming into the interest fund." By this act the continuing force of the coupons was acknowledged, and the holders thereof were invited to present them for registration; and the County of Lincoln, in effect, contracted that if the holders did so present them it would treat them as binding obligations irrespective of the lapse of time. The coupons here in suit were presented and registered as alleged in the complaint and admitted by the answer, within one year after they became due. It would be a fraud upon them to now announce that by accepting the provisions of this Act they were merely decoyed into fatal inactivity.

The case of Underhill *vs.* Trustees of Sonora was not referred to in deciding Nash *vs.* El Dorado, and probably because the facts in the latter case were essentially different from those involved in the former. Nash's complaint was filed in January, 1883. In it he alledged that nothing had been done subsequent to the year 1869 to carry out the Act of 1863, under which his bonds issued. He further showed that the ordinary and constitutional government of the county had been suspended and abrogated by the Act of 1874 (Statutes Cal., 1874, p. 825), whereby the government of the county had been committed to a "Board of Auditors," who, by section 10 of the Act, were denied the power to levy any taxes whatsoever.

In the the El Dorado case there was not only no provision for the registration of coupons, whereby the holders were lulled into inactivity; but after March, 1874, there was no tax levied nor any existing statute under which any tax

could be levied for the payment of Nash's coupons. Nash's case was, therefore, substantially different from that of Underhill *vs.* Trustees of Sonora, and from the one now under consideration.

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